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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JACOBO MARTI & SONS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Petitioner, Jacobo Marti & Sons, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 24, 1982.

QUESTION PRESENTED

Whether the National Labor Relations Board may, consistent with the Free Exercise clause of the First Amendment, assert jurisdiction over a cheese processing plant where the stipulated effect of such assertion would be to deprive the farmers in the New Wilmington, Pennsylvania Old Order Amish community of the only remaining method of marketing their milk that does not violate their religious tenets which, inter alia, prohibit their use of electricity, refrigeration, Sunday work, and their dealing with or associating with labor organizations?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (App. A, infra) is reported at 676 F.2d 975. The opinion of the Court of Appeals enforces the decision and order of the National Labor Relations Board (App. C, infra) which is reported at 255 N.L.R.B. No. 189 (1981).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 24, 1982 (App. B, infra). This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

STATUTES INVOLVED

This case generally involves the National Labor Relations Act, 29 U.S.C.

§151 et seq., but does not involve the interpretation of any specific section of that statute.

STATEMENT OF THE CASE

This case arose as a result of a charge which was filed by Walter W. Holler against Petitioner Jacobo Marti & Sons, Inc. ("Jacobo Marti" or the "Employer") with the National Labor Relations Board ("NLRB" or the "Board"), alleging that the Employer had violated Sections 8(a)(1) and (3) of the National Labor Relations Act ("NLRA" or the "Act") by discharging him on September 18, 1979.

Jacobo Marti[1] is a Pennsylvania corporation located in New Wilmington, Lawrence County, Pennsylvania. Jacobo Marti operates and manages a cheese processing and production plant for the Farmers' Cheese Cooperative Association (the "Association"), which is an

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[1] Jacobo Marti & Sons, Inc. is a closely held family corporation which has no parents, subsidiaries or affiliates within the contemplation of Rule 28.1 of the Rules of the Supreme Court.

agricultural cooperative association formed by, and in the control of, the Old Order Amish farmers in the New Wilmington area for the purpose of marketing their agricultural products. The Association employs Jacobo Marti pursuant to a cheesemaker/manager contract to process its raw milk into cheese and cheese by-products. The Employer exists solely because of this relationship; its only function has always been the making of cheese for the Association from members' milk.

The relationship between Jacobo Marti and the Association first arose in the mid-1950s. At that time, laws were passed in Pennsylvania regulating the storage temperature of raw milk which was to be marketed for consumption. Because the Amish, under their religion, did not believe, inter alia, in the use of electricity or refrigeration, they could not meet the maximum temperature restrictions imposed by the new law through their use of ice or water as a coolant. Their milk could no longer be marketed as such. The Association was formed and

constructed a building for the sole purpose of processing the milk of the New Wilmington Amish sect into cheese -- a less profitable product, but one through which milk could be marketed without the Amish running afoul of the temperature restrictions of the new law.[2] The building constructed by the Association is the plant involved in this proceeding.

The Association contracted with Jacobo Marti, a cheesemaker, to manage this plant to process the milk of the Amish farmers into cheese. The contract between Jacobo Marti and the Association remains in effect today. By its terms, the contract may be terminated at will by either party upon ninety days notice.

In the early 1960's, Jacobo Marti and his wife, Mary Jane Marti, purchased the land and buildings of the plant from the Association. Otherwise, Jacobo Marti's relationship as cheesemaker/manager for the Association remained unchanged. A few

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2 See, J. Hostetler, Amish Society (Rev. ed.), at 99; Dilling, Religion Boosts Domestic Cheese Output, American Butter Review (April 1950).

years later, Jacobo and Mary Jane Marti formed the corporation which is the Employer in this case. The land and buildings were transferred to the Employer and it assumed without change the performance of the Association cheesemaker agreement.

All of the cheese processed and produced at the plant is and remains the property of the Amish-controlled Association, from its delivery as raw milk through its ultimate sale as a finished cheese product. The Employer does not process any milk or produce any cheese except that of the Association. Indeed, the relationship with the Association is the sole reason for the original and continued existence of the Employer, and consequently the sole reason why persons are employed at the plant.

Pursuant to the cheesemaker agreement, Jacobo Marti employs all persons who work at the plant and is fully responsible for all of the operating costs and expenses of the plant. In turn, the Employer receives as its source of income a manager's commission from the Association based upon

cheese production and sales of the Association.

It is a stipulated fact that the Association has informed Jacobo Marti that, because of the tenets of the Old Order Amish religion, it will immediately terminate its agreement with Jacobo Marti should the Employer's employees form, organize or join a labor organization. Thus, because the Amish have no market for their milk other than the cheese production plant managed by Jacobo Marti, the effect of the Board's assertion of jurisdiction over Jacobo Marti will be to deprive the Amish farmers of the only remaining market for their milk. As an additional consequence, the 20 Amish Association members who also work at the plant would be required to quit. Moreover, since all of the milk processed by Jacobo Marti is owned by the Association and most of the milk processed is produced by Amish farmers, it is highly unlikely that Jacobo Marti could remain in business if the Association terminated the Agreement.

This case was tried before an NLRB Administrative Law Judge ("ALJ") who on September 26, 1980 issued a Decision and

Recommended Order, finding that the Employer had violated Section 8(a)(1) of the Act by threatening employees with plant closure if the Amish milk supply were lost and by promising increased wages and better working conditions, but concluding that Jacobo Marti's discharge of Holler was not a violation of NLRA Section 8(a)(3). The ALJ further found that the Board could assert jurisdiction over the Employer despite the symbiotic relationship between Jacobo Marti and the Amish-controlled Association. See App. C at 21a-54a.

On October 24, 1980, the Employer filed Exceptions to the ALJ's Decision, and the General Counsel filed Cross-Exceptions on November 14, 1980. On May 12, 1981, the Board issued its Decision and Order, in which the Board adopted the Recommended Order of the ALJ in its entirety, without substantive comment. See App. C, infra. Subsequently, the Employer filed a Petition for Review with the United States Court of Appeals for the Third Circuit, and the Board cross-petitioned for enforcement of its Order.

On April 26, 1982 the Third Circuit issued its opinion enforcing the Board's

Order in all respects. In rejecting the Employer's constitutional challenge to the Board's assertion of jurisdiction, the Third Circuit concluded that the burden was on Jacobo Marti to prove that it "comes within an exception to the Board's jurisdiction", citing therefor this Court's recent decision in United States v. Lee, ___ U.S. ____, 50 U.S.L.W. 4201 (1982). Although noting that the record demonstrated that in Marti's only other organizational campaign, in 1973, the Association had advised Jacobo Marti that it would be required by religion to terminate their relationship if Jacobo Marti's employees unionized, the Court went on to speculate that the Amish-dominated Association may not continue to adhere to that precept today, because the record did not establish an absence of change in belief. Based on this speculation, the Third Circuit ruled that "[t]he employer here has failed to show that the governmental obligation to be imposed 'interferes with the Free Exercise rights of the Amish.'" App. A at 14a-15a (quoting United States v. Lee, supra, 50 U.S.L.W. at 4203).

REASONS FOR GRANTING THE WRIT

This case presents unique, important and, in the words of the Third Circuit Court of Appeals, "troublesome", issues concerning constitutional limitations upon the Board's assertion of jurisdiction over an Employer whose sole purpose from its very inception was to provide a method by which the Old Order Amish farmers in the New Wilmington, Pennsylvania Amish sect could market their milk without violating their religious proscriptions against the use of electricity and refrigeration. These issues are raised primarily because of the unrebutted evidence that if a labor union is certified as a bargaining representative of Jacobo Marti's employees -- a result which could conceivably flow from the Board's assertion of jurisdiction over the Employer[3] -- the result would be that the Amish controlled Farmers' Cheese

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[3]There is now pending at NLRB Case No. 6-RC-8838 a Petition for Certification of Representation filed by the United Food and Commercial Workers Local 298, AFL-CIO-CLC, which could lead to just that result. App. A at 13a.

Cooperative Association would be forced to terminate its agreement with the Employer because of the religious beliefs of the Association's members. Specifically, it was stipulated that the Association informed Jacobo Marti during a union organization campaign in 1973 that, because of the tenets of this Amish sect's religion, it would terminate its agreement with Marti if the employees were to organize, form or join a labor organization. Moreover, the unrebutted testimony of the Employer's president, Jack Marti, was that if the employees formed or joined a labor union, the Amish-controlled Association would stop sending their milk to him for processing into cheese. Since all of the milk processed by Jacobo Marti is owned by the Association, and most of the milk processed is produced by Amish farmers, it would be highly unlikely that the Employer could remain in business without the Association's milk. Even if the Employer could find some other source of milk, the business certainly could not be operated on the same scale that it is operated pursuant to its relationship with the Association, and all or almost all of

the employees would be out of employment for at least some significant period of time.

Thus, the results of the Board's assertion of jurisdiction over Jacobo Marti are two-fold. First, the effect of such assertion would be to destroy the only market which the Amish farmers currently have for their milk since, because of their religious tenets which precluded them from using electric refrigeration, they can not meet temperature requirements for milk storage imposed by state law beginning in the mid-1950's. Having lost that market, the Amish farmers turned to the cheese processing alternative and established the relationship which now exists between the Association and the Employer.[4] Because of the religious beliefs of the Amish -- which preclude them from joining or dealing with labor unions -- the Amish would be

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[4] The Third Circuit's reference to the fact that neither Marti nor the Association are "religious or religiously affiliated" organizations (App. A at 9a) misses the point. The Amish religious beliefs were, and still are, the sole reason for the creation and continued existence of both.

prevented from continuing their relationship with the Employer if the Employer were to be unionized, and would no longer be able to supply Jacobo Marti with milk for cheese processing. The effect would be totally to deprive the Amish farmers of a market for their milk and thereby to place a significant and potentially destructive economic burden upon the Amish community. Second, concomitant to this burden upon the Amish farmers is the potentially disastrous if not fatal, effect upon the ability of the Employer to remain in business if Jacobo Marti's relationship with the Association -- its sole supplier of milk -- were to be terminated.

Notwithstanding the above evidence, which demonstrates that the assertion of jurisdiction by the Board over Jacobo Marti would have the effect of forcing the Amish farmers to choose between adhering to their religious beliefs or giving up the only remaining market for their milk, the Third Circuit ruled that the Board's assertion of jurisdiction did not violate the Free

Exercise clause of the First Amendment.[5] In so ruling, the Third Circuit departed from this Court's decisions concerning the limitations placed upon government regulation by the Free Exercise clause.

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[5] The Third Circuit noted that the Board had not disputed Jacobo Marti's standing to assert the First Amendment rights of the Association and of its Amish members, and assumed that Jacobo Marti had standing for purposes of its opinion. App. A at 8a. Of course, Jacobo Marti does have such standing because if the Employer were prevented from asserting these rights, the Amish would never have an opportunity to obtain judicial review of the burden placed on their religion by the Board regulation, because the Amish farmers would never themselves be subjected to the spectre of the application of the NLRA to their activities. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (physician permitted to assert the rights of patients to receive contraceptives as a defense in prosecution for selling contraceptives). See also Barrows v. Jackson, 346 U.S. 249 (1953) (white defendant who was party to a racially restrictive covenant permitted to assert equal protection rights of prospective Negro purchasers in action to enforce restrictive covenant); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (owners of private schools entitled to assert First Amendment rights of potential pupils and their teachers).

Last term, this Court, in United States v. Lee, ___ U.S. ____, 50 U.S.L.W. 4201 (1982), held that the payment of social security taxes for employees by an employer who is a member of the Old Order Amish did not violate the Free Exercise clause of the First Amendment, notwithstanding the fact that payment of social security taxes or receipt of benefits violated the Amish religious beliefs. In Lee this Court, although ultimately rejecting the Constitutional challenge to the social security statute, reaffirmed the analysis which previously had been applied in decisions such as Thomas v. Review Bd. of Indiana Employment Security, 101 S.Ct. 1425 (1981), Wisconsin v. Yoder, 406 U.S. 205 (1972) and Sherbert v. Verner, 374 U.S. 398 (1963) for determining whether an otherwise valid statute of general applicability could be enforced under circumstances which imposed a burden upon the free exercise of religious beliefs.

The first step under this anaylsis requires the identification of a religious belief whose exercise would be infringed by the governmental regulation or conduct under scrutiny. After this initial

demonstration that the governmental regulation would impose a burden upon the free exercise of religious beliefs, the burden shifts to the government to "justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." Lee, supra, 50 U.S.L.W. at 4203. In order to meet this burden there must have been, and there was not, a showing by the NLRB that the system could not function if the Amish were permitted to challenge the system because of the burden it placed on their beliefs, Lee, supra, 50 U.S.L.W. at 4204, or a showing that exemption of Marti would "present an administrative problem of such magnitude [as would have] rendered the entire statutory scheme unworkable." Sherbert v. Verner, supra, 374 U.S. at 408.

However, judicial inquiry into the constitutional validity of governmental regulation of conduct predicated upon religious beliefs does not end with the identification of an arguably compelling governmental interest in imposing the regulation or restriction. Rather, after a governmental interest has been identified,

it is necessary to weigh that governmental interest in regulating the activity at issue against the extent of the burden which the regulation has upon freedom of religion. See, Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

The ultimate burden remains with the government and should not be placed upon the Petitioner (as has been done by the Third Circuit in this case). Lee, supra, 50 U.S.L.W. at 4203, 4204. See also, Sherbert v. Verner, supra, 374 U.S. at 406 ("[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitations .... [it is] incumbent upon [the government] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment Rights"); Wisconsin v. Yoder, supra, 406 U.S. at 236 ("incumbent upon state to show with more particularity how its admittedly strong interest in compelling education would be adversely affected by granting an exemption to the Amish").

Consistent with this three-part analysis, this Court has invalidated state or governmental regulation in cases in which the burden which such regulation has upon the exercise of religious beliefs has been found to outweigh the government's interest in imposing the regulation. E.g., Wisconsin v. Yoder, supra, 406 U.S. at 234 (state interest in compulsory education is outweighed by the potentially destructive effect upon Amish community and way of life which would result from requiring Amish children to attend school until age sixteen); Sherbert v. Verner, supra, 374 U.S. at 408-409 (invalidated unemployment compensation regulation as applied to Seventh Day Adventist who was unable to work on Saturdays because of religious beliefs).

On the other hand, in cases in which the burden of government regulation on religion is slight, or in which the governmental interest is sufficiently compelling to outweigh that burden, claims that the governmental regulation violates the Free Exercise clause have been rejected. E.g., United States v. Lee,

supra, 50 U.S.L.W. 4203 (exemption from requirement to pay social security taxes not required where effect of such exemption would be to undermine the "fiscal vitality of the social security system"); Prince v. Massachusetts, 321 U.S. 158 (1944) (interest of state in protection of children outweighs burden on child's religious beliefs caused by prohibiting children from selling religious literature in public places); Braunfield v. Brown, 366 U.S. 599 (1961) (interest of state in providing uniform day of rest outweighs burden on religion of Jewish merchants caused by Sunday Closing Law).

In the instant case, the Third Circuit departed from the above analysis by reading this Court's decision in United States v. Lee to require Petitioner to satisfy the burden of establishing that it qualifies for an exemption to the Board's jurisdiction, rather than placing the burden upon the Board of establishing that its interest in asserting jurisdiction over Jacobo Marti constitutes an overriding interest which justifies the burden placed upon the religious freedom of the Amish

farmers in the New Wilmington area. The Third Circuit acknowledged the stipulated evidence that in 1973, the Association advised Jacobo Marti that because of the religious beliefs of its members the Association would terminate its Agreement if Jacobo Marti were to be unionized, but speculated that because the record did not affirmatively demonstrate the absence of a change in precepts by the Amish-controlled Association, Petitioner had not met its burden of establishing that the Board's assertion of jurisdiction would infringe upon the Amish farmers' exercise of their religious beliefs. App. A at 9a-10a.

Initially, it is apparent that the Third Circuit's statement and premise to the effect that "[w]hether the Association is still of that view is a crucial fact that is not in the record" (App. A at 7a-8a) ignores that portion of the stipulation stating that the agreement would be terminated solely "because of the tenets of the Amish religion". It is simply unjustified and incorrect to assume that, in a period of six short years, the Amish may have abandoned the traditions and

beliefs that they have adhered to strictly and "statically" for centuries before. See, Wisconsin v. Yoder, supra, 406 U.S. at 210, 216-217.

Moreover, this speculation by the Third Circuit is totally inconsistent with the admonition of this Court in United States v. Lee that it is not "within 'the judicial function and judicial competence' ... to determine [who] has the proper interpretation of the Amish faith." Lee, supra, 50 U.S.L.W. at 4203. "Courts are not arbiters of scriptural interpretation." Thomas v. Review Board, supra, 101 S.Ct. at 1431. By engaging in this unwarranted speculation as to the present nonexistence of the religious proscription which would prevent the Amish from continuing their relationship with Jacobo Marti, the Third Circuit improperly shifted the burden to Petitioner of showing that the interference with free exercise rights created by the Board's assertion of jurisdiction justified an exemption from jurisdiction. By placing that burden on Petitioner, the Third Circuit followed an analysis exactly opposite that set forth in

the decisions of this Court discussed at pages 15-21, supra, which requires the government to demonstrate that its interest in the application of the statute in question is sufficiently compelling to override the burden placed on religious freedom by such application.

Had the Third Circuit followed this Court's decisions by requiring such a showing by the NLRB, the evidence clearly would have compelled a finding that the Board's interest in asserting jurisdiction over Jacobo Marti is minimal at best, because the probable effect of such assertion would be to remove the only source of milk for the plant -- the Association -- thereby leading to the closing of the plant and the layoff of the very employees whom the Act is designed to protect.[6] Moreover, neither the Court of

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[6] Additionally, twenty of the 89 persons employed by Jacobo Marti are members of the Old Order Amish faith, and these 20 employees would not be permitted to continue working in Jacobo Marti's plant if it were to be unionized. This would not only constitute a burden upon the right of those individuals to continue their (continued)

Appeals nor the NLRB considered the Employer's alternative but related arguments that the purposes of the NLRA would not be effectuated if the proximate result of the assertion of jurisdiction was the loss of work by the very employees the Act is designed to protect. This should have been taken in account by the Court below in balancing the interests of the parties to determine if the NLRB justified the limitation on religious liberty as overriding or compelling.

The Third Circuit Court of Appeals has misinterpreted and misapplied this Court's

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6 (continued)
employment without violating any tenets of their religious beliefs, but also would impose a severe hardship upon the Employer with respect to the stability of its workforce. The Third Circuit's speculative conclusions to the contrary, at App. A at 12a-13a, fly in the face of undisputed record evidence. The record affirmatively and undisputedly showed that the employees who are members of this sect would be required to end their employment if the cheese plant is organized. The Court of Appeals improperly "delved into the contours of religious belief" to suggest that alternative accommodation had to be possible.

decision in Lee, supra, in another important respect. See App. A at 13a. It is well established that the continued existence of the Amish communal way of life is entirely dependent upon derivation of income from farming. See, Wisconsin v. Yoder, 406 U.S. 205, 210, 216-217 (1972); Hostetler, supra at 67-68, 99. The Amish did not enter into the "commercial activity" involved in this case as "a matter of choice," but as the result of legitimate religious compulsion in the face of religiously unacceptable alternatives. The commercial activity involved in United States v. Lee, supra, was completely divorced from Lee's religious beliefs. Here, the activity stems from the very fabric of those beliefs and is essential to their effectuation.

In short, the effect of the ruling of the Third Circuit "forces [the Amish] to choose between following the precepts of [their] religion and forfeiting [income from their farming], on the one hand, and abandoning one of the precepts of [their] religion in order to [market their milk] on the other hand. Governmental imposition of such a choice puts the same kind of burden

upon the free exercise of religion as would a fine imposed against [the Amish for refusing to use electricity, to work on Sunday or to deal with labor unions]." Sherbert v. Verner, supra, 374 U.S. at 404.

The Court of Appeals has decided the question presented in a manner totally inconsistent with this Court's decisions concerning the limitations placed upon government regulation by the Free Exercise clause. Because the Third Circuit's decision implicates important constitutional rights and will have a potentially fatal effect upon the continued viability of the Old Order Amish community in New Wilmington, Pennsylvania, this Court should issue a writ of certiorari to resolve these First Amendment issues.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1971

JACOBO MARTI & SONS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR REVIEW OF THE FINAL DECISION AND ORDER DATED MAY 12, 1981 OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-APPLICATION FOR ENFORCEMENT

Argued March 1, 1982
Before: HUNTER, WEIS and HIGGINBOTHAM,
Circuit Judges.
(Opinion filed April 26, 1982)

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OPINION OF THE COURT

WEIS, Circuit Judge.

In this appeal an employer attacks the jurisdiction of the National Labor Relations Board on First Amendment grounds. The employer processes cheese from milk supplied by a cooperative controlled by Amish farmers who oppose unions as a matter of religious belief. Alleging that if the Board exercises jurisdiction, the Amish will lose their

market for milk and the cheese plant will lose its sole supplier, the employer argues that it should be exempt from Board regulation. We do not find adequate factual support for the employer's assertions and grant enforcement of a Board cease and desist order.

A former employee filed an unfair labor practice charge with the Board, alleging that he was unlawfully discharged from his job because of union organizing activities. The Board concluded that the discharge had been for unrelated causes but, finding improper promises of benefits and a threat of plant closure, issued a cease and desist order. The Board also rejected a jurisdictional challenge that because of the close relatioship between the employer and its suppliers, unionization of the plant would impinge on the Amish religious tenets.

At the hearing before the ALJ there was testimony that the religious beliefs of the Old Order Amish sect proscribe the use of electricity. When Pennsylvania enacted regulations in 1955 requiring refrigeration of milk, a process which utilizes

electrical equipment, the Amish dairy farmers were unable to comply without violating their religion. They then organized the Farmers' Cheese Cooperative Association, to which they delivered their milk for eventual marketing as cheese products. The Association arranged to have Jacobo Marti, a non-Amish, convert the milk to cheese. Marti is paid a percentage of the proceeds from cheese sales.[1]

The Association supplies all of the milk Marti uses for cheese and retains title to the milk and cheese until it is sold. Marti hires and fires its employees, fixes wages and working conditions, and is fully responsible for all the operating costs and expenses of the cheese processing operation.

The plant employs eighty-nine persons, twenty of whom are Amish and members of the Association. They receive the same wages

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1. Marti was hired to manage the cheese processing plant in the mid-1950's. He later purchased the land and building from the Association and eventually incorporated. That company took over the contract with the Association.

as the other employees, but because of their religious beliefs, do not participate in the employer's profit-sharing plan or hospitalization benefits. The Amish employees are also not permitted to join a union.

The parties stipulated that "[d]uring an organizational campaign in 1973, the Association informed [Marti] that, because of the tenets of the Amish religion, it would terminate its agreement with [Marti] should [its] employees organize, form or join a labor organization." Jacobo Marti, plant president, testified that he did not think that he would have to shut down if a union came in, but that his business would be disrupted because he would lose his Amish suppliers and employees. He also said that the Amish dairy farmers in the area would have difficulty in finding another processor because there was "nobody around who could handle it." He was uncertain whether the Amish might arrange some accommodation to supply him with milk in the event that his employees became unionized.

The charges which triggered the hearing grew out of the discharge of Walter W.

Holler, a non-Amish employee. In June of 1979, after a year at the plant, Holler began to discuss the idea of unionization with fellow employees. When the personnel manager heard about these overtures, he invited Holler into a private office for a conversation about the situation. The manager explained the advantages and disadvantages of a union and pointed out that the plant couldn't function without the Amish and it would close if a union came in. In addition, he talked about forming a representative committee of employees and also indicated that if production were increased, wages could be raised. The ALJ found these remarks constituted a violation of §8(a)(1) and (3) of the National Labor Relations Act.

It was also determined that Holler's discharge three months later was the result of his disruptive conduct, not his union activity, and therefore, no violation occurred at that time. The ALJ accordingly recommended that a cease and desist order be issued to prevent the employer from making threats of plant closure or promising better working conditions if the

employees refrained from joining a labor organization.

The ALJ rejected the jurisdictional challenge, finding that the employer was a separate and distinct organization from the Association and that Marti had sufficient control over employment conditions so as to enable it to bargain with the union. He also found that the Association was a business corporation, was not church-sanctioned or "church operated", and so did not qualify for a religious exemption. The Board adopted the ALJ's findings and conclusions.

In its petition for review, Marti denies that the Board has jurisdiction "because of the symbiotic relationship which exists between the employer and the Old Order Amish farmers who comprise the Farmers' Cheese Cooperative Association." (Petitioner's Brief). In addition, the employer challenges the findings of the violations themselves. The Board has applied for enforcement of its order.

Marti's argument is that because of their religion, the Amish would be prohibited from dealing with its cheese

processing plant if it should become unionized. The lack of other facilities in the area would totally deprive the Amish of a market, and termination of the arrangement would be almost as disastrous for Marti. Furthermore, the employer asserts that Marti merely serves as the "alter ego of the Association," and therefore, has "standing to assert the First Amendment rights of the Associaton and its Amish members." (Petitioner's Brief).[2]

As stated, Marti presents troublesome questions of freedom of religion -- a right the courts jealously guard from governmental interference. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979); Wisconsin v. Yoder, 406 U.S. 205 (1972). Marti's arguments merit serious consideration and evaluation, but the record does not provide the adequate factual basis necessary to support the employer's contentions.

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2. The Board has not questioned Marti's standing to raise the First Amendment issue and we assume it here arguendo.

The record demonstrates that the Association is not a religious or religiously-affiliated organization, except to the extent that the majority of its members adhere to the Old Order Amish faith. Rather, the Association is a business corporation organized under the laws of Pennsylvania. According to its by-laws "[a]ny person, firm, partnership, corporation, or association," who produces agricultural products is eligible for membership by the purchase of a single share of stock. Some of the members are not Amish, although the officers and members of the Board practice that faith. Nothing in the by-laws refers to a religious purpose or in any way distinguishes this association from other agricultural cooperative organizations.

It is stipulated that because of the religious views of the majority of its members, six years before this controversy arose the Association told Marti that it would terminate its agreement if Marti's employees joined a labor organization. Whether the Association is still of that view is a crucial fact that is not in the

record. Jacobo Marti testified at one point that he had no doubt that the Association would terminate the contract if a labor organization represented his employees. Yet he also admitted that he did not know whether the Association would still supply him with their milk in that event. Thus, the record does not establish whether the Amish prohibition against joining a union extends to ban dealings with an organized company as well.

The current agreement between the Association and Marti provides that title to the milk and the cheese derived from it remains in the Association. If Marti's unionization made this arrangement unsatisfactory to the Amish, perhaps the transaction could take a different form. For example, it might be that the Association would be free to sell its milk to Marti at a comparable price to that which it now receives for it as cheese, with as much as he presently does under the eixsting arrangement.

There is no evidence before us to suggest that an alternative arrangement

would not avoid the asserted religious objections.[3] The record as it now stands

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3. Delving into the contours of religious belief is a sensitive area, and "[c]ourts are not arbiters of scriptural interpretation." Thomas v. Review Board, 450 U.S. 707, 716 (1981). As a preliminary matter, "[t]he narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that [the Association will terminate its contract if Marti unionizes] because of an honest conviction that such [association] was forbidden by [the Amish] religion." Id. It is this finding, however, that is not established by the record. Without questioning the sincerity of the Amish beliefs, it is unclear why a sales arrangement would offend the religious tenets of the Amish if Marti were to unionize when it was stipulated that "Jacobo Marti was hired to manage the plant and to do certain other acts prohibited by the Amish faith which the Association could not itself undertake."

neither demonstrates that the Amish will be completely deprived of a milk market nor that Marti will lose its supply. Without proof of underlying facts, the dire results which have been argued to us must be considered only speculation.

Analysis reveals a similar weakness in the assertion that the Amish could no longer be employed if a union came into the plant. Although their religion prohibits the Amish from belonging to a union, there is nothing here to show that they may not work side-by-side with employees who do join. Accommodation here, too, may be possible. The Labor Relations Act contains a provision that, in non-profit hospitals, a worker with religious objections to joining a union may instead contribute the monetary equivalent of union dues to a charity. 29 U.S.C. §169 (1976). See also Nottelson v. Smith Steel Workers, 643 F.2d 445 (7th Cir.), cert. denied, 50 U.S.L.W. 3376 (Nov. 9, 1981). Indeed, in Marti's case it appears that the Amish employees, because of their unwillingness to accept fringe benefits, are already receiving lower total compensation than the other

employees. Perhaps this portion could be given to a charitable organization, if necessary, without violating the employees' beliefs.

It is important to remember also that the other employees' interests are at stake. As the Supreme Court said in United States v. Lee, ___ U.S. ____, 50 U.S.L.W. 4201, 4204 (Feb. 23, 1982), "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."

It may be that there is indeed support for Marti's argument about repressive effects on Amish religious practices, but it not presented by the record in this case.[4] Hence, lacking evidentiary support, the employer's claim on behalf of

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4. We have been advised that a representation petition is presently pending before the Board. Our conclusions as to the lack of factual support in the present record, of course, do not prevent (continued)

the Amish cannot prevail. We have appraised Marti's case in the light most favorable to it, yet find it inadequate. Marti has not met its burden of proving that it comes within an exception to the Board's jurisdiction. NLRB v. Monterey County Building & Construction Trades Council, 335 F.2d 927, 930 n.4 (9th Cir.), cert. denied, 380 U.S. 913 (1964). The employer here has failed to show that the governmental obligation to be imposed

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[4] (continued)
the employer from developing additional information in the representation proceeding.

It must be noted that the Board lacks jurisdiction to pass on constitutional questions, such as the one raised here. Califano v. Sanders, 430 U.S. 99, 109 (1977). As we said in Tressler Lutheran Home for Children v. NLRB, No. 81-1302 (3d Cir. Apr. ____, 1982), resolution of such issues is left to the courts. The Board, however, must be especially sensitive when confronted with First Amendment free exercise objections.

"interferes with the Free Exercise rights of the Amish." United States v. Lee, 50 U.S.L.W. at 4203.

Moreover, the Board's decision may be sustained on an alternative ground -- that Marti is, in fact, an independent organization that controls its own employee relationships. See, e.g., Memorial Hospital v. NLRB, 624 F.2d 177, 185 (10th Cir. 1980); NLRB v. Howard Johnson Co., 317 F.2d 1 (3d Cir.), cert. denied, 375 U.S. 920 (1963). Although there is a possibility that the Association could terminate its contract because of Marti's labor policies, that eventuality exists for any number of other reasons as well, since either party has a right of termination on 90 days' notice. As Marti testified, severing the relationship would result in disruption of business, but would not result in closing the plant.

The Associaton did not reserve the right to control Marti's activities but, to the contrary, the agreement specifies that Marti is to "pay for all labor used in the operation of the factory." Thus, Marti's operation is no more symbiotic with the Association than is any other commercial

enterprise which depends upon a single supplier by virtue of a contract that may be cancelled on notice for any or no reason. Indeed, the stipulated facts state that the "Farmer's Cheese Co-operative Association is a separate and distinct enterprise from [Marti]." The record before us contains nothing to cast any doubt on that proposition.

Marti's cheese processing plant is not a religious organization, but a purely business one having only commercial aims. Its arrangement with the Association is one for the marketing of milk products, not of religious beliefs. Marti argues that it is paramount to the survival of the Amish community that the revenue obtained from the Association may be used to maintain their group. The fact that the money from the sale of cheese is used for the physical sustenance of the Old Order Amish families, however, does not convert the factory into a religious enterprise -- any more than if the proceeds went to the families of other diverse religious groups. The fact that the Amish farmer may choose to use his money to support himself in the manner his

religion requires does not convert his profit-making pursuits into what the law conceives to be religious activity. The individual Amish farmer is seeking to support himself, just as do farmers of other creeds or those who have no religious beliefs.

We find no need to discuss the unfair labor practice charges at any length. There is substantial evidence to support the ALJ's conclusion that the employer violated §8(a)(1) and (3). The manager overstated the case when he told Holler that the plant would close if a union came in. As we mentioned earlier, Jacobo Marti's own testimony does not support the manager's position. The manager's comment was not a statement of fact, and we therefore cannot say that the ALJ erred in construing it as a threat. NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). Similarly, the promises of better conditions were advanced to dissuade Holler from pursuit of his union activities.

We conclude, therefore, that the Board has jurisdiction and that it properly

issued a cease and desist order. Therefore, it will be enforced.

A True Copy:

Teste:

Clerk of the United States Court
Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JACOBO MARTI & SONS, INC.,	)	
	)	
Petitioner,	)	
v.	)	No. 81-1971
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
	)	
Respondent.	)	

JUDGMENT

Before: HUNTER, WEIS and HIGGINBOTHAM, Circuit Judges

THIS CAUSE came on to be heard upon a petition filed by Jacobo Marti & Sons, Inc., challenging the National Labor Relations Board's assertion of jurisdiction over Jacobo Marti & Sons, Inc. and to review an order of the National Labor Relations Board issued against said Petitioner on May 12, 1981, and upon a cross-application filed by the National Labor Relations Board to enforce said

Order. The Court heard argument of respective counsel on March 1, 1982, and has considered the briefs and transcript of record filed in this cause. On April 26, 1982, the Court, being fully advised in the premises, handed down its opinion concluding that the National Labor Relations Board properly subjected said Petitioner to its jurisdiction on the evidence presented before the National Labor Relations Board in this proceeding and granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board directed against Jacobo Marti & Sons, Inc., New Wilmington, Pennsylvania, be and hereby is enforced.

IT IS FURTHER ORDERED that each party shall bear its own costs.

BY THE COURT

_____
Circuit Judge

DATED: May 24, 1982

APPENDIX C

255 NLRB No. 189 FJZ

D--7679
New Wilmington, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JACOBO MARTI & SONS, INC.

and Case 6-CA-12995

WALTER W. HOLLER, an Individual

DECISION AND ORDER

On September 26, 1980, Administrative Law Judge Russell M. King, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a brief in support thereof, and Respondent filed an answering brief to the General Counsel's cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and

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1 The General Counsel and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance (continued)

conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Jacobo Marti & Sons, Inc., New Wilmington, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. May 12, 1981

John H. Fanning, Chairman
Howard Jenkins, Jr.,
Member
Don A. Zimmerman, Member
NATIONAL LABOR RELATIONS
BOARD

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[1] continued
of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

APPENDIX
NOTICE OT EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the
United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten our employees with plant closure if they become represented by a union.

WE WILL NOT promise employees increased wages and better working conditions if they refrain from supporting a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

JACOBO MARTI & SONS, INC.
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice of compliance with its provisions may be directed to the Board's Office, Porter Building, Tenth Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219, Telephone - 412-644-2969

JD-590-80
New Wilmington, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JACOBO MARTI & SONS, INC.
Respondent Employer

and Case No. 6-CA-12995

WALTER W. HOLLER, An Individual
Charging Party

William Slack, Esq., of
Pittsburgh, PA, for
the General Counsel
John E. Lyncheski, Esq.
(Reed, Smith, Shaw &
McClay), of Pittsburgh, PA,
for the Respondent Employer

DECISION

RUSSELL M. KING, JR., Administrative Law Judge: This case was heard by me in Sharon, Pennsyvania on June 26, 1980. The initial charge was filed by the individual Walter W. Holler on December 17, 1979 and an amended charge was filed on February 11, 1980. The complaint was issued by the Regional Director Region 6 of the National Labor Relations Board (the "Board") on behalf of the Board's General Counsel on February 28, 1980, alleging certain violations of Section 8(a)(1) and 8(a)(3) and (1) of the National Labor Relations Act

(the "Act") in September 1979, including the unlawful discharge of the individual Holler on September 19, 1979.[1] The Respondent denies the violations and contends it discharged Holler for good cause. The Respondent also defends on jurisdictonal grounds and argues that the alleged violations of Section 8(a)(1) of the Act should be dismissed as being beyond the 6-month period of limitation provided for in Section 10(b) of the Act.

Upon the entire record including my observation of the demeanor of the

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[1] All dates hereafter are in 1979 unless otherwise indicated. The pertinent part of the Act provides as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer -- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 ... (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discharge membership in any labor organization ....
>
> * * *
>
> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...

witnesses,[2] and after due consideration of the briefs filed herein by the General Counsel and the Respondent, I make the following:

Findings of Fact

1. Jurisdiction

A. Basic Facts

The Respondent contests jurisdiction in this case on constitutional grounds. It contends that the Board is prohibited from asserting jurisdiction by virtue of the First Amendment because of its relationship with a religious organization, the Farmers' Cheese Co-operative Association (the "Association").

The pleadings, testimony, evidence and admissions herein establish the following

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[2] The facts found herein are based on the record as a whole and upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits with due regard for the logic or probability, the demeanor of the witnesses, and the teaching of N.L.R.B. v. Walton Manufacturing Company, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in light of the entire record.

jurisdictional facts.[3] The Respondent company is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the State of Pennsylvania with an office and place of business in New Wilmington, Pennsylvania, where it is engaged in the manufacture and retail sale of cheese and related products.

The land and buildings in which the cheese processing and production plant is located are owned by Respondent corporation, having been purchased from Jacobo and Mary Jane Marti who in turn had purchased said land and buildings from the Association pursuant to a provision in Jacobo Marti's original agreement to manage the plant for the Association. Respondent owns or leases all of the equipment and machinery used in the plant. The Charging Party herein (Walter W. Holler) was an employee of Respondent at the cheese processing plant. The plant employs approximately 89 persons, approximately 20 of whom are members of the Association and of the Amish faith. Because of the Amish tenets of the Association and pursuant to the cheesemaker agreement, Respondent employs all such persons and is fully responsible for all of the operating costs and expenses of the plant. In turn, Respondent receives a manager's commission from the Association based upon cheese

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[3] Counsel entered into an extensive written Stipulation containing numerous facts regarding jurisdiction. That Stipulation was admitted as Joint Exhibit No. 1.

production and sales of the Association. All of the cheese processed and produced at the plant is and remains the property of the Association, from its delivery as raw milk through its ultimate sale as afinished cheese product. Respondent does not process or produce any milk or cheese except that of the Association. During the calendar year ending December 31, 1979, Respondent received a total of $4,170,809.00 from the Association as its manager's commission. The commission is paid to Respondent by the Association on a monthly basis determined by the sales of the Association during that month. During the calendar year ending December 31, 1979, Respondent purchased goods and materials valued in excess of $50,000.00 for use at its cheese processing and production plant, which were shipped to the plant directly from points outside the State of Pennsylvania.

Pursuant to a separate agreement, Respondent provides an office staff to manage and maintain the books and accounts of the Association for its cheese sales. During the calendar year ending December 31, 1979, the Association derived gross revenues from sales of cheese products well in excess of $500,000.00, and shipped cheese products valued in excess of $50,000.00 directly from Respondent's New Wilmington, Pennsylvania facility to points located outside the State of Pennsylvania.

The Farmers' Cheese Co-operative Association (the "Association") was formed by the Amish farmers in the New Wilmington area for the purpose of marketing the

agricultural products of its members. The Association is in the control of members of the Amish faith, who constitute most of its membership. The Association is a separate and distinct business enterprise from Respondent, but employs Respondent pursuant to a cheesemaker/manager contract to process its raw milk into cheese and cheese by-products.[4]

The Respondent is also engaged in a second separate and distinct business called the "Cheesehouse." The Cheesehouse is a store located in New Wilmington, Pennsylvania which is engaged in the retail sale of cheese and other products. The Cheesehouse employs two to three persons on the average and is not directly involved in this proceeding except to the extent that it is a business of Respondent. The products sold by the Cheesehouse are not those of Respondent's plant or other operation, or of the Association. All sales of the Cheesehouse are made directly within the State of Pennsylvania at the New Wilmington store. During the calendar year ending December 31, 1979, the gross volume of business from retail sales of the Cheesehouse was $524,658.00. The Cheesehouse is located in a building and on land which is leased by Respondent corporation from Jacobo and Mary Jane

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[4] A copy of the original agreement was admitted into evidence. It was executed in 1955, and was between the Association and Jacobo Marti, alone.

Marti.[5] The Association has no interest in the Cheesehouse.

At the time of the initial agreement between Jacobo Marti and the Association in 1955, Jacobo Marti was hired to manage the plant and to do certain other acts prohibited by the Amish faith which the Association could not itself undertake. The Respondent corporation has since assumed the performance of that agreement.[6] The Association operates pursuant to Bylaws which refers to the Respondent corporation as the "cheesemaker."[7] The Board of Directors and Officers of the Association all are, and always have been, members of the Amish sect. Because of their religion, Respondent's twenty Amish employees are permitted to enjoy certain of the fringe benefits enjoyed by the non-Amish employees. They are paid the same wages as the non-Amish employees. The Amish are not permitted to work on Sunday, or past 8 p.m. on any other day. During an organizational

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[5] Jacobo Marti and his wife Mary Jane are co-owners of the Respondent corporation.

[6] There is no written agreement to this effect in evidence. It is contained in the Stipulation. Other than the Stipulation, there is no explanation for the inconsistancies in the original agreement in light of the new arrangement when the Respondent corporation was formed (in 1967).

[7] A copy of those Bylaws were admitted into evidence.

campaign in 1973, the Association informed Respondent that, because of the tenets of the Amish religion, it would terminate its agreement with Respondent should Respondent's employees organize, form or join a labor organization. Neither Respondent corporation nor Jacobo Marti has an interest in, or is a member of the Association. No stockholder or officer of Respondent corporation is a member of the Amish faith.

B. Legal Analysis and Conclusions

The original agreement between the Association and Marti alone was in 1955. In 1957 the Marti's puchased the land and plant buildings from the Association, formed their own corporation (Respondent) and sold the plant to that corporation. The Respondent corporation rents or owns all of the equipment and machinery in the plant, hires and pays all employees, and is fully responsible for all operating costs and expenses of the plant. The raw material and finished products (milk and cheese) remain the property of the Association, and the Association markets the cheese. Respondent obtains and uses only milk furnished by the Association. Most members of the Association are Amish, but some are not. The Respondent's profit is a "commission" or payment from the Association based upon gross cheese sales less current wholesale prices plus a fixed amount (which wholesale price and fixed amount reverts directly to the Association). In other words, the gross profits are divided (although not necessarily equally) between the Respondent

and the Association. The Respondent maintains the plant, equipment, and pays salaries out of its share of the gross profits.

The Respondent argues in this case that the Association is an exempt entity, that is exempt from the Board's jurisdiction for religious reasons, and that this exemption follows to Respondent because of its close ties with the Association. I disagree. I find that the Association is just that, a formal association of area farmers for the purpose of marketing their products. Its members are in the main of the Amish faith or religion, as are all of its directors, but it is not church sanctioned or "church operated." The Association is a Pennsylvania corporation. Its bylaws reflect that it is a business corporation, without mention of any religion or religious faith whatsoever. The religious exemption from the Act is a narrow one, requiring direct and absolute affiliation, and in complete pursuit of religious beliefs and purposes. Such is not the case here.[8] Notwithstanding, in my opinion a conclusion contrary to the above still would not place the Respondent under the umbrella of exemption. Not only is the Respondent clearly included within the definition of an "employer" in Section 2(2) of the Act, I find the Respondent has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their

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8 Cf. N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 100 LRRM 2915 (1979).

representative.[9] The Respondent owns the land, plant building and fixtures. It exclusively controls, disciplines, hires, fires, sets and pays the salaries of its employees. It essentially controls the terms and working conditions of its employees, including the setting or granting of such benefits as health plans and pensions. Respondent points out that it has agreed to and does employ 20 individuals of the Amish faith among its some 90 employees and their beliefs are contrary to the potential results of employee union representation. However, the religious beliefs of these employees can not serve to deprive the balance of Respondent's employees from their rights under the Act. In my opinion their beliefs are superseded in this case.[10]

The Respondent also argues in this case that if the Board asserts jurisdiction and subsequently the employees become represented by a union, the Respondent would lose its Amish connection and go out

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9 See National Transportation Service, Inc., 240 NLRB No. 99, 100 LRRM 1263 (1979), where the Board established the new "right of control" test in place of the "intimate connection" standard (Members Penello and Murphy dissenting); applied in Loma Prieta Regional Center, Inc., 241 NLRB No. 165, 101 LRRM 1026 (1979).

10 See Linscott v. Millers Falls Company, 440 F.2d 14, 76 LRRM 2994 (1 C.A., 1971), citing Railway Employees' Dept. v. Hanson, 351 U.S. 225, 38 LRRM 2099 (1956).

of business. The Respondent asserts that such a result would be contrary to the purpose of the Act. This argument is also without merit. Although personnel manager Miller told employee Holler that the plant could not "function" without the Amish, owner-president Marti himself in his testimony refuted any such result, indicating that the worst result would be "disruption." Additionally, the Respondent has chosen to operate in the industrial public market place, and place itself in interstate commerce.[11] Having done so it has subjected itself to much Federal and State legislation designed not for its protection but for the protection of others. It is not at liberty to exclude adherence to a particular law to facilitate its business practices and preferences, even if admirable.

I find and conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that the charging employee Walter W. Holler was thus an "employee" within the meaning of Section 2(3) of the Act.

II. Alleged Unfair Labor Practices

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11 It is clear and uncontroverted that the Respondent satisfies the Board's jurisdictional amounts for both retail and nonretail enterprises.

A. Summary of the Evidence[12]

Walter W. Holler was hired by the Respondent in August 1978 as an assembly line worker. He was discharged September 18. Prior to September, Holler related that he had only received one written warning and that was by plant superintendent Ronald Miller in October for absenteeism. In August he had also received a verbal complaint from the Respondent's president Jacobo Marti for leaving the assembly line when he was

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[12] The following includes a summary of the testimony of the witnesses appearing in the case. The testimony will appear normally in narrative form, although on occasion some testimony will appear as actual quotes from the transcript. The narrative only and merely represents a summary of what the witnesses themselves stated or related, without credibility determinations unless indicated, and does not necessarily reflect my ultimate findings and conclusions in this case. The General Counsel filed a Motion to Correct the transcript with his brief. The Motion was unopposed and is hereby granted. The transcript is hereby changed as follows:

Page	Line	Change	To
14	13	they	he
16	21	tape	cheese
16	22	teeth	cheese
16	22	walks	cheese
18	20	I'm thinking now	If you know
23	3	shout	shut
28	12	were	are

making boxes. Holler indicated that this complaint was made by Marti because Marti desired that he remain on the line at all times as he was the fastest employee atmaking boxes, which was his usual job on the assembly line.

In early September Holler himself concluded that he would initiate a drive to bring a union into the cheese plant. He had not yet contacted any union or union representative. On appoximately September 3 at a gathering of some 15 employees in the lunchroom he suggested that they try to get a union into the factory because of working conditions. According to Holler, present at this lunchroom meeting was also his assembly line supervisor Jim Defendorf. Holler related that over the next two weeks he participated in three more talks or group meetings with other employees in the lunchroom, in the parking lot and in a restaurant across the street from the plant.[13] Holler testified that on September 10 Marti approached him and accused him of being the "ring leader." Soon after he was called into personnel

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13 Former employee Jeffry Dallas initially testified that Holler approached him once in "September" in the lunchroom when he was alone about a union. In cross-examination, Dallas' testimony became unexplainably confused and conflicting. He changed the year of the conversation from 1979 to 1978, then back to 1979 and ending again with 1978. Dallas had been discharged in December (1979) for absenteeism.

manager Miller's office whereupon Miller asked him "how far had [they] gone with the union", to which he replied that it was thus far "all verbal." According to Holler, Miller then stated that a union would "close our doors", that the company could not afford a union, and that the Amish employees would not let a union come into the factory. Holler then complained to Miller about not getting a recent open position in the factory, and Miller insured him that thereafter all jobs would be posted and thereafter awarded to "the one who deserves it ... by seniority, from here on out."[14] Holler then related that Miller outlined a plan to form an in-plant employee committee with one person from each department, indicating that they were going to try to improve working conditions and pay, and Miller suggested that he (Holler) go back and explain these plans to the other employees.

Holler testified that the following day (September 11) he was wrapping cheese on the line and Miller approached him, accused him of slowing down the line by talking too much to other employees, and assigned him to work in the "hot box." The hot box was a room where the cheese was actually produced and put through a "cooker", and where approximately 9 to 11 employees worked on a daily basis. According to

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[14] Holler testified that almost 50 percent of the employees had been hired after he was hired and that he had wanted the position (the "sewage job") but that someone else had been chosen for the job.

Holler, he had been assigned to the hot box approximately four to five times previously but in his opinion the hot box was an undesirable assignment and that he had complained about such assignments in the past. Holler went on to explain that the temperature in the hot box reached as high as 115 to 120 degrees, although he conceded that Marti himself worked in the hot box "quite often", further relating that in the winter the hot box could possibly be considered as a desirable assignment as there was no heat in the rest of the plantand that in parts of the plant the temperature reached as low as 10 degrees. Holler further conceded that many of the other employes were assigned to the hot box "about once a week." Later in the day on September 11 Holler was talking to two other employees in the hot box regarding a union when Marti walked in and "screamed" at him stating "... damn it, you were put in here to keep away from the rest of the guys, and shut up, you can't listen." The following two days (September 12 and 13) Holler indicated that he was again assigned to work in the hot box approximately one half his working time each day.

Holler testified that on September 18 line foreman Defendorf approached him and employee Raymond Chropac and admonished them not to talk to a third employee named "Peter Rabbit", Holler then indicating that both he and Chropac ceased the conversation. According to Holler, several minutes later while he was talking to employee Joe Reed, Marti himself approached and again told him to stop talking and to resume making boxes, and as Marti was

walking away he yelled "he can't ever shut up." A few minutes later Holler related that he asked Reed for some new tape for his "taper" and Marti again approached, reminding him "about shutting up" and abruptly started "screaming" at him. He then asked Marti why he was screaming at him and Marti replied "you don't tell me what to hell to do, as a matter of fact, get the hell out of here, I don't need you." Later on in the day, personnel manager Miller came to him on the line and told him he was fired and to go obtain his timecard. Holler testified that throughout his employment and prior to September he would frequently talk to other employees, that he knew of no company rule or policy against such talking, and was never previously disciplined for such conversations.[15]

Ronald J. Miller had been the personnel manager for the Respondent for six years.[16] Contrary to Holler's testimony, Miller related that he learned of Holler's union activities early in the summer, in either June or July. Upon gaining this knowledge, a call was placed to the Respondent's attorney Merle Hart and advice was obtained as to how to handle the

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[15] Former employee Dallas testified that he and other employees talked while working and he knew of no reprimands for such talking.

[16] The complaint alleges that Miller was the "plant superintendent." During his testimony, Miller was somewhat uncertain as to his exact title but referred to himself as the "personnel manager."

situation involving Holler.[17] As a result of this advice, Miller testified that he immediately talked to Holler about his activities, whereupon Holler denied that he had talked about a union with other employees, but notwithstanding this denial, Miller indicated that he proceeded to discuss the advantages and disadvantages of a union in the plant, urging that a union was not needed. He explained the present benefits to Holler and although he stated that the Respondent could not presently increase these benefits, he talked in terms of the employees increasing production with a resulting pay increase. Miller conceded that he could have talked about a "committee" and further admitted that he brought up the Respondent's relationship with the Amish, making it clear that if a union came into the plant the Amish could no longer work at the plant or furnish the plant milk, and that the plant would thus be out of business. Miller denied any outright threat to close if a union came in but related that it was his desire that Holler understand the ultimate result. Miller indicated that after this discussion with Holler in June or July, he heard nothing further about a union or any union activities.

Miller testified that Holler was given one "written violation" for absenteeism earlier in his employment, and thereafter the sitaution "straightened out."

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17 Hart also testified in this case and labeled himself as being engaged in "labor consultation, primarily arbitration."

Beginning in March, Miller indicated that he began to have problems with Holler "disrupting the line" by talking to other employees and that thereafter, at least once a month, he would talk to Holler about the problem. Regarding Holler's assignment to the "hot box", Miller admitted that he assigned Holler to this station in September because he needed additional help there, and also because Holler was at that time again disrupting the line. Miller explained that the average temperature of the hot box was between 85 and 90 degrees, but with high humidity. He related that the remainder of the plant is heated "to some extent" but does get cool during the winter with the lowest temperature approaching 45 to 50 degrees. Miller indicated that a temperature of 10 degrees would be impossible in the plant because the water lines would freeze. According to Miller, most of the employees who worked in the hot box asked for the assignment and that several other employees were currently waiting to be assigned here. Regarding Holler's request to be assigned to the sewage job, Miller had little knowledge as to why he was not chosen but indicated that Holler's seniority at that time was in the "lower two thirds."

Regarding Holler's discharge on September 18, Miller testifed that early in the morning he again spoke to Holler about his talking with employee weigher Joe Reed. Soon thereafter Marti arrived and he, Marti and line supervisor Defendorf conferred together about Holler's talking and, concluding that it had been a continual problem and continued to disrupt

the line, and that all three of them had talked to Holler that morning, he and Marti together decided to discharge Holler. Miller indicated that Holler's talking was a problem throughout virtually his entire employment, but it did not get "a great deal worse" near the end of his employment.

Meryl W. Hart testifed that on July 6 he went to the plant at Marti's request, whereupon Marti explained that there had been talk about a union in the plant, and that this talk had been traced to one particular employee. Hart indicated that he was familiar with the relationship of the Respondent with the Amish people, and testified that although he did not remember the name of the employee involved, he suggested that they talk to the employee and explain the Company's benefits and further attempt to elicit from the employee the reason for his union favoritism. Hart further testified that in July he "tailor made a [new] grievance procedure" for the Respondent and that in this connection he visited the plant again on July 23, 26 and 27.[18]

Jacobo Marti testified as president of the Respondent and related that in "May or June" Miller told him that employee Holler had been talking about a union. Thereafter

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18 For these services in July, the Respondent paid Hart $600 and that check from the Respondent, dated July 27, was admitted in evidence. Hart testified that after July he had no dealings whatsoever with the Respondent regarding any union activities in the plant.

he called labor consultant Hart for advice and the result was that Miller talked to Holler about the situation.[19] According to Marti, after Miller talked to Holler there was no further talk about any union. Marti testified that to his knowledge, Holler had only worked in the hot box once in either July or August. He related that during the summer months, the hot box temperature often rose above 90 degrees but that the room was very comfortable in the winter.

Marti testified that on September 18 he arrived at the plant between 10 and 11 a.m. and immediately saw Holler talking with employee Joe Reed, who was weighing cheese. Marti indicated that he was "very much disturbed" and thereafter talked to Miller who informed him that both he and line superintendent Defendorf had spoken to Holler about talking to Reed earlier that morning. Marti related that when he went home for lunch that day, he discussed the problem of Holler with his wife and that together they made the decision to discharge Holler.[20] Marti testified

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19 Marti later conceded that Hart was probably right about the fact that the incident occurred approximately July 6.

20 Marti's wife, Mary Jane, testified that her husband in fact came home for lunch on September 18 and that he was very upset and stated "he was having trouble with Walter Holler again." She indicated that her husband had complained about Holler on previous occasions. As a (continued)

that he himself worked in the plant almost daily and he never actually saw Holler talking to other employees although he had received complaints from them regarding Holler. Marti readily conceded that he did not want any union in the plant, indicating that it would probably not cause him to close the plant but would "very definitely" cause "disruption." Marti added that "his producer ... Amish people" and 20 to 25 Amish plant workers would be lost if the plant was unionized, further relating that the milk he used to produce cheese comes solely from the Association which is composed of approximately 250 milk producers, a few of which are not Amish but sell through the Association.

B. Evaluation of Law and Evidence and Initial Conclusions

It is uncontested in this case that the Respondent was strongly and firmly against any union and had knowledge of Holler's union desires and activities among the employees, and I so find. A most significant question raised by the testimony is when Holler's union activities commenced and took place. Holler contends early September, on the heels of his discharge, and president Marti, personnel manager Miller and attorney Hart all

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20 (continued)
solution, she then suggested that he discharge Holler. Mrs. Marti was a 50 percent stockholder in the Respondent corporation and also was a corporate officer.

contend it was not later than early July.[21] I find that in fact Holler's union activities did take place no later than early July and I thus credit that testimony of Marti, Miller and Hart over that of Holler in this regard.[22] I thus further find that personnel manager Miller's conversation with Holler took place on or about July 6. After talking to Marti and attorney Hart, Miller called Holler in and talked to him for I find the

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21 Former employee Dallas testified that Holler spoke to him about a union in "September" but was uncertain whether it was 1978 or 1979. Dallas was so uncertain and vacillating that I find his testimony totally unreliable and discredit him completely. Unexplainably, no other employee was called to verify the time, nor was line foreman Defendorf, who Holler indicated was present among a group of some 15 employees in the lunchroom when he advocated and talked about the need for a union.

22 Holler's testimonial story came in rapid-fire fashion and without emotion, and as if he had committed the facts (as he told them) to rote memory. In later testimony he bordered on the incredible when he claimed the plant was 10 degrees in the winter. These and other remarks, together with his demeanor and manner made it apparent to me that Holler's veracity in this case was highly questionable. I discredit substantial and significant portions of his testimony in favor of Marti and Miller in this case.

sole purpose of dissuading him from further union activities. He attempted to convince Holler that a union was not needed, explaining existing benefits, and indicating that production could be increased and thus wages could be raised. He also I find talked about a representative committee of employees,[23] and, by stating that the plant could not function without the Amish, made it clear to Holler (whether rightly or wrongly) that the plant could close if a union came in. The wage and plant "function" remarks by Miller I find constituted an improper promise of benefits and threat, and I shall conclude them to be violations of Section 8(a)(1) of the Act as alleged in paragraphs 7(a) and (c) of the complaint.[24]

On September 11 personnel manager Miller assigned Holler to work in the hot

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[23] Holler so testified, and Miller testified that he "could have" talked about such a committee.

[24] Paragraph 7(b) of the complaint alleges improper "interrogation" based on Holler's claim that Miller asked about the "status" of the Union. I find that no such inquiry was made. Paragraph 7(d) of the complaint alleges the promulgation of an unlawful no-solicitation rule, relying it seems on the tenure of the entire conversation as an implied directive not to further engage in union support and activities. I do not find such to be the case here. There was no direct mandate or (continued)

box (cheese production room).[25] Miller conceded that the assignment had been made not only because he needed an additional employee there, but to remove Holler from the line because he was disrupting the line by talking. Holler testified that he felt the hot box was oppressive, and that its temperature reached 115 to 120 degrees. Miller testified that the temperature averaged 85 to 90 degrees and it was a desirable place to work. Marti himself

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[24] (continued)
any threat of discharge. The seed of dislike was most certainly planted but no rule with sanctions was promulgated, to Holler or any other employee. The violations of Section 8(a)(1) found above are alleged by the Respondent to be barred by the 6-month limitation rule in Section 10(b) of the Act. I find no merit in this contention. The initial charge was filed by Holler on December 17, 1978, and amended on February 11, 1979. Both contained the general "By the above and other acts" clause. The violations alleged in paragraph 7 of the complaint relate directly to Holler and his union activities, and were fully litigated in this case. In like manner, my findings that the violations occurred on or about July 6, and not in September as alleged in the complaint, are proper under Section 10(b) of the Act. See also Monroe Feed Store, 112 NLRB 1336, 36 LRRM 188 (1955).

[25] Holler testified that he was also assigned to the hot box on September 12 and 13 for one-half of each day.

worked there frequently. Most if not all employees periodically worked in the room and the operations carried on there were indispensable to the plant's production.Other than the discredited testimony of Holler about one single incident, there is absolutely no evidence in this case that any of Holler's discussions or talking with other employees on the line involved a union.[26] I find that the hot box assignment was not oppressive or discriminatory against Holler, and although made in part to take him off the line to prevent him talking to other employees, it was not out of fear or belief that Holler's talk could or did involve a union, but was accomplished to prevent slowing down the production line at the time. Accordingly I find and conclude that Holler's assignment to the hot box on September 11 was not violative of Section 8(a)(1) and (3) of the Act.

Regarding Holler's actual discharge on September 18, Marti arrived in the late morning, observed Holler again talking and also learned that both Miller and Defendorf had talked to Holler earlier that morning. To Marti, who became mad, this was the final blow. Holler had, in his judgment, been an excessive talker for a year and he had been talked to on many occasions. Whether out of anger or not, Marti

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26 I here again note the lack of testimony of other employees like Joe Reed or Raymond Chropac, who were involved in the talking incident with Holler the day he was discharged.

ultimately decided to discharge Holler.[27]

The evidence and creditable testimony in this case convinces me that Holler's discharge was in no way motivated by his union activities several months previously.[28] I thus find and conclude that Holler's discharge on September 18 was not violative of Section 8(a)(3) and (1) of the Act.

Upon the foregoing findings of fact and initial conclusions and upon the entire record, I hereby make the following:

Conclusions of Law

1. That the Respondent employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that Walter W. Holler was an

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[27] Holler indicated he was discharged later on that day and Miller testified that he and Marti jointly decided to discharge Holler. Marti and his wife testified that the decision was made when he came home for lunch that day. I find that Marti and Miller did come to an accord about Holler but Marti, realizing the decision was somewhat impulsive decided to again mention the situation of Holler to his wife, who in effect sanctioned the discharge without hesitation by suggesting it.

[28] This finding is made after additionally analyzing the evidence and testimony in terms of the Board's recent holdings in Wright Line, A Divison of Wright Line, Inc., 251 NLRB No. 150 (August 27, 1980).

employee within the meaning of Section 2(3) of the Act.

2. That on or about July 6, 1979 the Respondent threatened employee Walter W. Holler with plant closure if a union came in, and promised said employee increased wages and better working conditions without the need or benefit of a union, in violation of Section 8(a)(1) of the Act.[29]

3. That the unlawful conduct concluded in paragraph 2, above, and found herein, affected commerce within the meaning of Section 2(6) and (7) of the Act.

4. That other than the misconduct concluded in paragraph 2, above, the Respondent has not violated the Act as additionally alleged in the complaint in this case, or otherwise.

The Remedy

Having found that the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and of the Act, I shall recommend that it be ordered

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29 I previously found herein that Miller did suggest and discuss the formation of a "committee" with Holler during their union conversation. Such a committee would constitute an employee bargaining tool and implies ultimately better working conditions.

to cease and desist therefrom,[30] and that it take certain affirmative action designed to effectuate the policies of the Act. I shall also recommend that the Respondent be required to post appropriate notices at its New Wilmington, Pennsylvania plant.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[31]

The Respondent, Jacobo Marti & Sons, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with plant closure if the employees became represented by a union or labor organization.

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30 I shall also recommend that the additional "cease and desist" provisions of the Order be of the narrow variety, which I feel to be more appropriate in this case. See Hickmott Foods, Inc, 242 NLRB No. 177, 101 LRRM 1343 (1979).

31 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Promising increased wages and better working conditions if employees refrain from supporting or joining a union or labor organization.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its plant and facility in New Wilmington, Pennsylvania the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, in and about work areas and other areas as indicated above, including all places where notices to said employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that

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32 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 6, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint against the Respondent be, and it hereby is, dismissed insofar as it alleged unfair labor practices not specifically found herein.

Dated, Washington, D.C. September 26, 1980.

/s/ Russell M. King, Jr.
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all parties participated and were given the opportunity to call witnesses, examine and cross-examine witnesses, and to present evidence, it has been found by the National Labor Relations Board that we have violated the National Labor Relations Act, as amended. We have been ordered to stop such activity, to post this notice, and to abide by its terms.

WE WILL NOT threaten our employees with plant closure if they become represented by a union.

WE WILL NOT promise employees increased wages and better working conditions if they refranin from supporting a union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in exercising their rights guranteed in Section 7 of the Act.

JACOBO MARTI & SONS, INC.
(Employer)

Supreme Court, U.S.
FILED
SEP 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-141

In the Supreme Court of the United States

OCTOBER TERM, 1982

JACOBO MARTI & SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that exercise of its jurisdiction over petitioner would not infringe the free exercise of religion by Amish farmers who supply petitioner with milk for its cheesemaking operation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-18a) is reported at 676 F. 2d 975. The decision and order of the National Labor Relations Board (Pet. App. 21a-55a) are reported at 255 NLRB 1428.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1982. The petition for a writ of certiorari was filed on July 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Farmers' Cheese Cooperative Association ("the Association") is a group of farmers, most of whom are Amish, who have joined together to market their milk (Pet.

App. 9a-13a). In 1955, the Association entered into a contract with Jacobo Marti, which provided that Marti would manage a cheesemaking plant for the Association and would perform certain other tasks which the Amish members of the Association could not undertake (*id.* at 31a).[1] Sometime thereafter Marti purchased the plant and formed petitioner. Petitioner owns the land and cheesemaking plant and has assumed Marti's obligations under the cheesemaker agreement with the Association (*id.* at 4a). Pursuant to that agreement, petitioner processes the Association's raw milk into cheese and cheese by-products; the Association retains ownership of the final product. None of petitioner's stockholders or officers is Amish, nor does petitioner own any stock in the Association (*id.* at 32a).

In 1978 a union campaign began at petitioner's plant, led by employee Walter Holler (Pet. App. 37a). Personnel manager Ronald Miller learned of Holler's activity and told him that the company could not afford a union. Miller described the existing benefits offered by petitioner and said that if the employees became less wasteful and more productive, petitioner might increase wages. Miller spoke about forming an employee committee to promote improved work habits, working conditions, and pay. Miller also stated that if a union came in, petitioner's Amish employees[2] could no longer work at the plant, that the Association would no longer supply petitioner with milk, and that the petitioner would therefore have to close (Pet. App. 6a, 38a, 47a).

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[1]Pennsylvania enacted regulations in 1955 requiring refrigeration of milk, which would have required the Amish (contrary to their religious beliefs) to use electricity (Pet. App. 3a-4a).

[2]Twenty of petitioner's 89 employees are Amish (Pet. App. 4a). During a union organizational campaign in 1973, the Association informed petitioner that it would terminate its agreement should petitioner's employees join a union (Pet. App. 5a).

2. The Board found that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by promising to increase wages and improve benefits if the employees did not support the union, and by threatening to close the plant if the employees chose a union to represent them (Pet. App. 21a-22a).

In so finding, the Board rejected petitioner's contentions that the First Amendment exempted the Association from the Board's jurisdiction and that petitioner was exempt because of its close ties to the Association. The Board found that the Association was not a religious organization, but rather a business corporation which was "not church sanctioned or 'church operated' " (Pet. App. 33a). The Board further found that, even assuming the Association was exempt from its jurisdiction, the exemption would not extend to petitioner, who "has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization" (*ibid.*). The Board also rejected petitioner's contention that its assumption of jurisdiction would not effectuate the policies of the Act because petitioner would be forced to cease operating. The Board found that claim to be factually unsupported, concluding that loss of petitioner's Amish customers would at worst cause "disruption" to petitioner's business (Pet. App. 34a-35a).

3. The court of appeals agreed with the Board that the free exercise clause of the First Amendment did not preclude assertion of Board jurisdiction over petitioner. The court noted that petitioner's First Amendment argument was based on the contention that (Pet. App. 7a-8a):

> because of their religion, the Amish would be prohibited from dealing with its cheese processing plant if it should become unionized. The lack of other facilities in

> the area would totally deprive the Amish of a market, and termination of the arrangement would be almost as disastrous for Marti.

However, the court found that these factual contentions were not borne out by the record (Pet. App. 8a, 11a-12a).

Specifically, the court found that the record did not establish that the Association would not supply petitioner with milk if the latter's employees were unionized (Pet. App. 10a). The court added that "the record does not establish whether the Amish prohibition against joining a union extends to ban dealings with an organized company as well" (*ibid.*). As the court pointed out (*id.* at 11a n.3):

> Without questioning the sincerity of the Amish beliefs, it is unclear why a sales arrangement would offend the religious tenets of the Amish if Marti were to unionize when it was stipulated that "Jacobo Marti was hired to manage the plant and to do certain other acts prohibited by the Amish faith which the Association could not itself undertake."

The court noted that, even if petitioner's unionization would make the Amish unwilling to continue their present arrangement, "[t]here is no evidence before us to suggest that an alternative arrangement would not avoid the asserted religious objections" (*id.* at 10a-11a).

The court also agreed with the Board that petitioner is "an independent organization that controls its own employee relationships" (*id.* at 15a). The court noted that the Association could cancel petitioner's contract for any or no reason and concluded that petitioner's "operation is no more symbiotic with the Association than is any other

commercial enterprise which depends upon a single supplier by virtue of a contract that may be cancelled on notice for any or no reason" (Pet. App. 15a-16a).[3]

ARGUMENT

Petitioner contends that if, as a result of the Board's exercise of jurisdiction over it, its employees unionized, the Association would be compelled to cease doing business with it because of the religious beliefs of the Association's Amish members. Petitioner further contends that in that case the Association would have no market for its milk and petitioner would have no supplier for its cheesemaking operation. The court of appeals found it unnecessary to determine whether these factual assertions (if well-founded) would establish a violation of the Amish farmers' rights under the Free Exercise Clause of the First Amendment,[4] because the record did not support them. The only question actually presented here is whether that assessment of the record is correct.[5] That fact-bound issue does not warrant review by this Court.

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[3]The court also rejected petitioner's claim, made on behalf of his 20 Amish employees, that they could no longer be employed if a union came into the plant. "Although their religion prohibits the Amish from belonging to a union, there is nothing here to show that they may not work side-by-side with employees who do join." (Pet. App. 12a).

[4]The court assumed arguendo that petitioner has standing to raise the First Amendment issue even though petitioner has not asserted infringement of any religious belief or practice of its own. See Pet. App. 8a n.2. The petition for a writ of certiorari presents no question in this Court other than the First Amendment issue.

[5]In *United States* v. *Lee*, No. 80-767 (Feb. 23, 1982), the Court held that the preliminary inquiry in determining whether an enterprise must be exempted from regulation on First Amendment grounds is whether regulation actually interferes with the free exercise of religion. Once such interference is demonstrated, "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an

In any event, the court of appeals correctly concluded that on this record no burden on the free exercise rights of Amish members of the Association was shown. The record does not demonstrate that the Association, because of the religious precepts of its Amish members,[6] could not deal with petitioner if it unionized. Nor does it show that the Amish would have no market for their product other than petitioner. Finally, the record does not sustain the position that loss of the Association's milk supply would be fatal to petitioner's business.

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overriding governmental interest." Slip op. 5. See also *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Petitioner urges (Pet. 16) that the court of appeals improperly put the burden on it to show that the religious interest allegedly impaired here overcame the governmental interest. However, it is petitioner's initial burden of showing an interference with the free exercise of religion that the court found was not met.

[6]Petitioner relies largely (Pet. 10) on the stipulation that in 1973 the Association asserted that it would break its contract with petitioner if the latter's employees unionized. As the court noted (Pet. App. 9a-10a), it is not shown whether the Association was still of that view. In any event, as the court further noted, petitioner conceded a difference between the contractual arrangement which it had with the Association and the willingness of the Association to supply it milk under a different arrangement, and "admitted that he did not know whether the Association would still supply him with their milk in [the] event [of unionization]."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1982

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